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JOHN F. DAVIS

In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. 1023

ROBERT E. RATH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
for the Sixth Circuit.

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In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. _____.

ROBERT E. RATH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI To the United States Court of Appeals for the Sixth Circuit.

Petitioner, Robert E. Rath, respectfully petitions that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit filed January 8, 1969, affirming the verdict of conviction by a jury to eight counts of income tax evasion reached on November 7, 1967, in the United States District Court at Toledo, Ohio and entered as a judgment on December 11, 1967.

OPINIONS BELOW.

On November 7, 1967, a jury found the defendant guilty of eight counts of income tax evasion in the District Court for the Northern District of Ohio, Western Division in Toledo, Ohio, and Judgment was entered December 11, 1967. (Appendix 1.)

On January 8, 1969, the United States Court of Appeals for the Sixth District filed its judgment with the

Clerk thereof and this judgment affirmed the verdict and judgment entered by the District Court in Toledo on December 11, 1967. (Appendix 2.)

STATEMENT OF JURISDICTION.

The judgment sought to be reviewed was handed to the Clerk of the United States Court of Appeals for the Sixth District on January 8, 1969.

On January 16, 1969, the United States Court of Appeals for the Sixth Circuit granted a stay of mandate to and including February 7, 1969.

The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States is 1254 (1) of Title 28 of the United States Code.

QUESTIONS PRESENTED.

Where a government exhibit, namely Government's Exhibit No. 328, purports to be a summary of specific items to be adjusted, income computations, analysis of earnings and surplus, computations of taxable incomes of two corporations for several years, in which corporations defendant had an interest, and computations of defendant's individual income for several years (and which were the work of Michael C. Schiller, Technical Adviser to the Assistant Regional Commissioner for Enforcement Activity, who was permitted to stay in the courtroom during the entire proceedings, who as the last of the witnesses for the government had personally examined, classified and interpreted all of the exhibits introduced by the government, in said exhibit) is admitted into evidence and copies thereof are passed out to the jury, does not the admission of said exhibit into evidence and its unrestricted use by the jury constitute prejudicial error?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The 16th Amendment to the Constitution of the United States is the basis of the federal jurisdiction:

Constitution of the United States of America, Amendment XVI—Income Tax.

"The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."

Defendant was convicted of violations of Section 7201 of Title 26, United States Code:

Section 7201 of Title 26.

"7201. Attempt to evade or defeat tax.

"Any person who wilfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more that $10,000—or imprisoned not more than 5 years, or both, together with the costs of prosecution."

STATEMENT OF THE CASE.

The trial court overruled the objections of the petitioner directed to the admissibility of the testimony of 69 Government witnesses on direct examination. The basis of petitioner's objections lay in the fact that the testimony was immaterial and irrelevant. The court admitted the testimony upon the prosecution's promise to present a "summarizing" witness and thereby tie it all together.

The Government's 70th witness was qualified as an expert witness and thereafter he became the "summarizing" witness who, over the objections of the petitioner presented each of the jurors a photo-copy of his summary identified as Exhibit No. 328,

This Exhibit No. 328 was composed of highly refined abstracts of the testimony of the proceeding 69 witnesses and these abstracts were made the basis of adjustments to the income tax returns of the petitioner without regard to credibility or any other matter that the jury might have taken into consideration in evaluating or acting upon the evidence.

While it would be unfair to say that all questions of doubt were resolved in favor of the Government, let the petitioner be heard to say that few, if any, doubts were resolved in his favor.

Petitioner here was convicted on the basis of otherwise inadmissible testimony cured of its irrelevancy or immateriality by an Agent of the Internal Revenue Service, who applied said testimony to the adjustment of petitioner's income tax returns.

REASONS FOR ALLOWANCE OF THE WRIT.

The Writ should be allowed and this cause remanded for a new trial because the court in its rulings exceeded the permissible limits implicit in the rule announced in *United States vs. Johnson,* 319 U. S. 503 which held that:

> "Admission of testimony of an expert witness regarding income and expenditures of one of the accused in this case, although consisting of computations based on substantially the entire evidence in the record, held not an invasion of the province of the jury, where, in the light of the judge's charge, all issues are left to the independent, unforeclosed determination of the jury." (Head note No. 11. Discussed fully at page 519.)

The jury was permitted to hear otherwise inadmissible evidence on the one hand, and, on the other hand, was permitted to be influenced by Exhibit No. 328, which was not evidence in any sense of the word. (Appendix 3.)

Petitioner contends that even though Exhibit No. 328 is scrupulously clear of any error of commission, the composition of Exhibit No. 328 is by its very nature, a process involving the weighing, choosing and deciding of evidence and, to the extent that this is so, the province of the jury is invaded. Furthermore, the size, completeness, polished suavity and the obvious "know-how" of the completely competent author will logically affect its readers. The readers so affected could have been the jury.

It is beyond reasonable doubt that the jury was prejudiced by Exhibit No. 328 and this prejudice was not neutralized by the instructions of the court. (Appendix 4.)

CONCLUSION.

It is respectfully suggested that this case presents a problem in evidence not only vital to the petitioner but vital to every citizen of the United States in guaranteeing constitutional rights in criminal matters. This truly was a trial in which the petitioner was convicted by a mass of irrelevant testimony completely immaterial to the accusation, converted, digested and re-presented to the jury in writing by an expert witness compelling the jury to a verdict of conviction.

Petitioner prays that the judgment of conviction be reversed and the sentence revoked, or, in the alternative, to allow the Writ and remand the case for a new trial.

Respectfully submitted,

WILLIAM J. MACDANIELS,
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Toledo, Ohio 43604,
Counsel for Petitioner.

APPENDIX 1.

JUDGMENT AND COMMITMENT.

(Filed December 11, 1967.)

On this 11th day of December, 1967, came the attorney for the government and the defendant appeared in person by counsel.

IT IS ADJUDGED that the defendant upon his plea of not guilty and verdict of guilty by jury has been convicted of the offense of wilfully and knowingly attempting to evade and defeat Federal Income Tax, Violation Title 26, U.S.C., Sec. 7201, as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Five (5) years on each of eight (8) counts to run concurrently.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

DON J. YOUNG,
United States District Judge.

APPENDIX 2.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(Filed January 8, 1969.)

Before WEICK, Chief Judge, and PECK and MCCREE, Circuit Judges.

Appellant contends primarily in this appeal that the presence of an unauthorized person in the grand jury room rendered the indictment returned by it invalid and that receipt in evidence of a summary statement prepared by an expert constituted prejudicial error. A technical violation of Rule 6(d), Federal Rules of Criminal Procedure, occurred when an attorney who was a stranger to this action unintentionally interrupted the grand jury proceedings by entering the courtroom in which they were being conducted. The record establishes that the proceedings were halted at the moment of his entrance, and were not resumed during the fifteen to twenty second period of his presence. We hold that the interruption did not invalidate the proceedings or the indictment.

The eight-count indictment charged violations of 26 U.S.C. 7201. The Government offered extended testimony and several hundred exhibits in support of the charges of violations of the Internal Revenue Code, and the summary exhibit was offered by an expert whose qualifications were not (and are not) challenged, and who was available for cross-examination. The exhibit was based upon evidence previously received and the trial judge properly instructed the jury concerning it. Under such circumstances the exhibit was properly received in evidence (*Epstein v. United States*, 246 F.2d 563 (6th Cir. 1957), *cert. denied*, 355 U.S. 868; *Barber v. United States*, 271 F.2d 265 (6th Cir. 1958)), and the record discloses no impropriety in its use.

The remaining contentions of the appellant are determined to be without merit, and accordingly,

IT IS ORDERED that the judgment of the District Court be and it hereby is affirmed.

APPENDIX 3.

EXCERPTS FROM TRANSCRIPT OF TRIAL.

EXAMINATION OF WITNESS SCHILLER.

(1239) Q. Do you have those schedules with you? A. Yes, I do.

Q. Were all these schedules prepared by you, Mr. Schiller? A. They were all prepared under my supervision. The summary schedules, which begin with schedule 1, the even numbers being the ones prepared exclusively by me. The schedules labeled 1-A or 2-A or 2-B, and so forth, were prepared by other Internal Revenue Agents under my supervision, but they were reviewed entirely by me.

Q. You checked them for accuracy? A. Yes, I did.

Q. I show you Government Exhibit 328, Mr. Schiller, and I will ask you whether this is a true copy of the contents of that Exhibit? A. This is a reproduction of my schedules, yes, sir. Some of the schedules have been reduced in size, but it is an exact reproduction.

Mr. Walker: Your Honor, the Government offers Exhibit 328 at this time.

Mr. MacDaniels: Objection.

Mr. Walker: I also request permission to distribute copies of this exhibit to the members (1240) of the Jury and to the Court and to Defense Counsel.

The Court: What is the ground of the objection?

Mr. MacDaniels: I object to its admission. I think

if you will rule on that first we can get to the second Motion.

The Court: What is the ground of the objection to its admissibility?

Mr. MacDaniels: It is not evidence.

The Court: What do you say to that, Mr. Mattimoe?

Mr. Mattimoe: It is a summary of evidence, as the witness stated, and it is his summary upon which he will base his conclusions. We have authorities if the Court desires.

The Court: It will be received.

Mr. MacDaniels: Objection.

The Court: I presume your Motion that these copies be handed to the members of the Jury is so that they can follow the discussion?

Mr. Walker: That is correct. These are exact reproductions of the schedules that will permit the Court, Defense Counsel and the members of the Jury to follow the witness' testimony.

(1241) The Court: Do you have any objection to that, Mr. MacDaniels?

Mr. MacDaniels: Yes, the Defendant objects to that.

The Court: On what grounds?

Mr. MacDaniels: It is not evidence.

The Court: Objection overruled, and the Motion will be granted. You may hand each of the Jurors a copy of the Exhibit.

Mr. MacDaniels: I would like to add to my grounds the fact that the Defendant feels this Exhibit 328 is not evidence. I would like to add the ground that it is prejudicial.

The Court: I will adhere to my ruling. It will be admitted and the Jurors can be handed copies of it so that they can follow it.

Mr. MacDaniels: To speed things up a little, at this time I would like to make a general objection to each and every question based upon Government Exhibit 328 addressed to the witness.

The Court: I will give you a general objection to each and every question.

(1242) Mr. MacDaniels: Yes, to be propounded by the Government.

The Court: All of this witness's testimony will come in over your objection and exception.

Mr. MacDaniels: Fine.

Q. Now, Mr. Schiller, referring to page one of Exhibit 328, would you describe the format of that schedule to the Jury so that they might follow your testimony? A. Yes. The format that is followed throughout, not just with page one but for clarification—is that page one is also labeled schedule one in the upper left-hand corner. Page two is a continuation of schedule one; and page three, we will take these three pages together just for clarification.

Page three is labeled in the upper left-hand corner Schedule 1-A, and in the upper right-hand corner is labeled Schedule 1-B.

Now, those three pages present a unit. Those units will be repeated as we go through the schedules 1, 2, 3 and so forth.

To start with, Schedule one and pages one, two and three will be a unit. Page one, Schedule one, is labeled a Summary Of Specific Items To Be Adjusted To Pac-Rite Industries For The Calendar Year 1960.

* * * * *

APPENDIX 4.

CHARGE OF THE COURT TO THE JURY.

(1853) It now becomes my duty to charge you as to the law in this case. While you are the sole judges of the facts and the credibility of the witnesses, your oath requires you to accept the law as it is given by the Court, and to apply that law in your deliberations. You are not permitted to change the law, nor to apply your own conception of what you think the law should be.

This particular case began with the return of an indictment by the Grand Jury. This indictment is not evidence for any purpose. The indictment is the instrument used to inform the defendant of the criminal acts with which he is charged. The fact that it was returned may not be considered as evidence or as raising any presumption against the defendant.

A plea of "not guilty" has been entered to the indictment. This plea is a denial of the charges, and puts in issue all the essential elements of the crimes charged.

Under the Constitution of the United States, one charged with crime is presumed to be innocent until proven guilty. This presumption remains with the defendant until it is overcome * * *.

* * * * *

(1873) * * * This is a criminal case. The defendant is charged under the law with the commission of a crime, and the fact that he has or has not settled the civil liability for the payment of taxes claimed to be due to the United States is not to be considered by you in determining the issues in this case, except as it may throw some light on the intent of the defendant.

There have been admitted in evidence certain exhibits variously referred to as schedules or summaries.

Strictly speaking, these exhibits are not actual evidence, but they were admitted as summaries of other evidence in the case and they are admitted only for your assistance and convenience in considering the other evidence which they purport to summarize. Exhibits of this nature are permitted where they are based upon voluminous books, records or documents already in evidence, in order to assist you in determining the ultimate facts or results shown by such books, records or documents. But you are reminded that it is the books, records and documents which are the evidence, and the summaries are admitted only to assist you in considering that evidence. For that purpose, you are entitled to consider them.

* * * * *

PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

October Term, 1968

No. 1,030

ALFRED E. COLEMAN, *et al.*,

Petitioners,

vs.

UNITED STATES OF AMERICA and STEWART L. UDALL, Secretary of the Interior,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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IN THE

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October Term, 1968
No. .....

ALFRED E. COLEMAN, *et al.*,

Petitioners,

vs.

UNITED STATES OF AMERICA and STEWART L. UDALL, Secretary of the Interior,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The petitioners, particularly Alfred Coleman, petitions for writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit dated December 4, 1968.

Opinion Below.

The judgment of the United States Court of Appeals for the Ninth Circuit was made and entered December 4, 1968. A copy thereof is appended to this petition at Appendix pages 1-3 hereof.

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

A motion to stay the mandate was issued by the United States Court of Appeals for the Ninth Circuit until January 25, 1969, for filing this petition for writ of certiorari.

Constitutional Provisions, Statutes and Federal Rules and Regulations Involved.

Articles I and II of the United States Constitution.

The pertinent portions of Article V of the United States Constitution and Article XIV of the Amendments thereto.

The Mining Laws of the United States, as amended, 30 U.S.C. Sections 21, *et seq.*, particularly Section 161, The Building Stone Act of 1892.

The Administrative Procedure Act of the United States, 5 U.S.C., Chapter 5, Sections 500, *et seq.* (formerly Chapter 19, Sections 1001, *et seq.*), especially Section 552 thereof.

The Common Varieties Act of July 23, 1955, 30 U.S.C. Section 611.

Rules and regulations of the Department of the Interior relating to mining, particularly 43 C.F.R. 3511.1-(a) and (b).

Questions Presented.

1. Was it proper for the Court of Appeals for the Ninth Circuit by its Order dated December 4, 1968, to refuse to rule on the issues presented to it in our Petition for Hearing or Rehearing, dated June 17, 1968, because that Court felt it had no discretion under the mandate sent to it by this Court with its decision of April 22, 1968?

In his concurring opinion Chief Judge Chambers makes the following comment:

> "There is a puzzle here: Why did the Supreme Court remand the case to us?

But I have reluctantly concluded it left us no discretion. I have tried and failed to find some way we could salvage some part of our original opinion (see 363 Fed. 2d 190) for which I retain my fondness." (Emphasis added)

2. Has Alfred Coleman been denied his constitutional rights, and particularly due process, by the administrative proceedings in the Department of the Interior and in the Court reviews thereof?

Statement.

I.

This petition grows out of the decision of this Court in the case of *United States v. Coleman, et al.*, dated April 22, 1968, 390 U.S. 599.

A copy of that decision was sent to the United States Court of Appeals for the Ninth Circuit, containing the following mandate:

"* * * The case is reversed and remanded to the Court of Appeals for the Ninth Circuit for further proceedings to carry out this decision."

In its decision in the case of *Ex parte Medway*, 90 U.S. 504, at pages 506-507, this Court stated:

"Our mandate required the Court of Claims to proceed in the cause remanded in conformity to law and justice. We did not undertake to direct what law and justice did require, any further than to say that upon the finding of facts appearing in the record sent to us upon the appeal, the judgment was erroneous. *In everything else the Court of Claims was left free to proceed with the cause in its own way and according to its own judicial discretion. That discretion we cannot control in this form of proceeding.*" (Emphasis added).

As there were several questions involved in this case which were not passed upon by the Supreme Court in its decision of April 22, 1968, and as several other questions arose because of that decision, Coleman, *et al.* filed a petition with the United States Court of Appeals for the Ninth Circuit to consider and determine the following questions:

(a) Does the stone covered by the Coleman mining claims have a property or properties giving it "distinct and special value" under 30 U.S.C. Section 161, as pointed out as necessary by the Supreme Court of the United States in its decision of April 22, 1968?

(b) This Court decided that the Common Varities Act applied to the Coleman mining claims because of a dictionary definition submitted by the attorneys for the United States that quartzite is a most common stone. The Court of Appeals for the Ninth Circuit was asked in our petition to determine whether the definition of common varieties by the Department of the Interior dated September 7, 1962, and published in 27 Federal Register on September 14, 1962 (43 C.F.R. 3511.1(a) and (b)) exclude the building stone on the Coleman mining claims from the definition of common varieties? (See Appendix B, page 4 hereof).

(c) This Court in its opinion of April 22, 1968, found that the so-called "marketability at a profit" test was a logical complement to the old "prudent man" rule. Since this Court did not determine whether the "marketability at a profit" rule had been properly promulgated by the Department of the Interior, the United States Court of Appeals for the Ninth Circuit was asked by us to determine that question because the Administrative Procedure Act, 5 U.S.C., Chapter 5, Sec-

tion 552 requires that an addition to current regulations must be published in the Federal Register so that the public will be fully apprised of such "amendment or revision." Therefore, if the marketability at a profit "complementary" rule was not so published, we asked that the United States Court of Appeals for the Ninth Circuit declare said "complementary" rule invalid.

(d) The United States Court of Appeals for the Ninth Circuit was asked to determine whether the rule of "marketability at a profit" was unconstitutional because it is vague, indefinite and uncertain.

II.

(a) In its decision of April 22, 1968, this Court determined, based upon the unsupported suggestions of the attorneys for the Department of the Interior, that Section 161 of the mining laws was "* * * entirely effective as to building stone that has 'some property giving it distinct and special value' (expressly excluded under Section 611)."

As the meaning of Section 161 of the mining laws was not an issue in the contest hearing or any appeals thereof within the Department of the Interior, there was no evidence before this Court from which it could determine either of the following questions:

> "(1) What is the special type of building stone still covered by Section 161?
>
> (2) Was and is the building stone on Mr. Coleman's mining claims of the type specified by this Court?

To ascertain these facts the case should be returned to the Department of the Interior for further hearing

and we so requested the United States Court of Appeals for the Ninth Circuit. That Court felt it had no discretion under your mandate.

(b) This Court in its decision of April 22, 1968, stated that the "marketability at a profit" rule used by the Department of the Interior against Mr. Coleman was a "logical complement" to the "prudent man" rule. This Court had not been informed that the "marketability at a profit" rule had not been properly promulgated by the Department of the Interior by publication in the Federal Register, as required by the Administrative Procedure Act (5 U.S.C. Section 552). See Appendix D, page 7 hereof.

Research has proved that the "marketability at a profit" rule had never been published in any edition of the Federal Register, and it has not been published in any of the documents issued by the Department of the Interior for the information of the members of the public who desired to locate mining claims.

We, therefore, asked that this question be ruled on by the United States Court of Appeals for the Ninth Circuit.

It, therefore, would appear that the decision of this Court, dated April 22, 1968, should be modified as to the mandate sent to the United States Court of Appeals for the Ninth Circuit, in accordance with the prior decision of this Court in the case of *Ex parte Medway,* 90 U.S. 504, 506-507, from which we quote above, to permit these questions to be considered and determined by the United States Court of Appeals for the Ninth Circuit.

(c) While the attorneys for the Department of the Interior claimed in their Brief to this Court after cer-

tiorari was granted that the "marketability at a profit" rule has been used as a discovery test for a long time, they offer no proof and the facts do not sustain that statement. The "prudent man" test, in use since 1894, has been approved by the Supreme Court of the United States several times, one of the latest decisions being *Best v. Humbolt Placer Mining Company,* 371 U.S. 334 (January 4, 1963). There is no reference in that decision by this Court to "marketability at a profit." Since this Court held that the "marketability at a profit" rule was a "logical complement" to the old "prudent man" rule, it comes within Section 552 of the Administrative Procedure Act, which provides in part as follows: "* * * each amendment, revision or repeal of the foregoing must be published in the Federal Register."

Further proof that "marketability at a profit" was not used until recently is evidenced by a pamphlet issued by the House Committee on Interior and Insular Affairs covering a hearing held by the Subcommittee on Friday, February 1, 1957. This report covers a hearing before that Committee growing out of alleged abuse by the Department of the Interior in the administration of the Common Varieties Act which was passed July 23, 1955. Various employees of tte Department of the Interior testified that the Department did not require a showing of profit to find a claim to be valid under that law.

To refresh the Court's recollection we call attention to a series of pamphlets issued by the Department of the Interior from time to time almost every year. They are entitled "Lode and Placer Mining Regulations." Mr. Coleman procured one such pamphlet be-

fore he started his first locations in 1949. Others we have are numbered Circular No. 1785, February 1, 1951; Circular No. 1941 amended to include November 1, 1955, etc.; the latest such pamphlet we have is dated July 10, 1964. None of them mention "Marketability at a Profit." One pamphlet is entitled: "Mining Claims; Questions and Answers." It is dated 1963. We quote from the bottom of page 3 thereof and at the top of page 4:

> "There must be an actual physical discovery of mineral on each and every claim and this discovery must satisfy the 'prudent man' rule. *Commercial grade ore is not required* but mere traces, isolated bits of mineral or minor indications are not sufficient to satisfy the 'prudent man' rule." (Emphasis added).

Please note that this pamphlet is issued eight years after the passage of the 1955 law, and nothing is said in the pamphlet in regard to "marketability at a profit." We call attention to the following language in the above quotation:

> "COMMERCIAL GRADE ORE IS NOT REQUIRED * * *"

In other words the public is not informed by the Department of the Interior about the new and additional test of "marketability at a profit."

The Department of the Interior is, of course, bound by its own regulations and particularly the information given to interested members of the public for their guidance. This is not a matter of estoppel but plain honesty.

Further, attention is called to the following provisions contained in Section 552 of the Administrative Procedure Act, 5 U.S.C.:

> "Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. * * *"

Until such time as the Department of the Interior complies with the Administrative Procedure Act and publishes its regulations defining "marketability at a profit," it is improper and illegal to apply that test to the Coleman mining claims.

(d) In addition the "marketability at a profit" rule is unconstitutional because it is vague, indefinite and uncertain.

What does "market" mean?

What does "profit" mean?

How should any prospector know while he is operating what will be declared by the Department of the Interior to be a market and what will be declared to be a profit?

This Court has repeatedly declared laws invalid because they are vague and uncertain. One of the latest cases was a decision rendered by this Court on April 22, 1968, the same date that the *Coleman* decision was rendered; the case is *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676.

Another decision on this point was issued by this Court during the 1967 Session, being:

Zwickler v. Koots, 389 U.S. 241.

See also:

Keyishian v. Regents of New York University, 385 U.S. 589 (1967).

Many other decisions could be cited, but the rule is too well known to need elaboration.

Reasons for Granting Writ.

1. The constitutional rights of Mr. Coleman have been denied by the misinterpretation of the mining laws by the Department of the Interior.

2. There is a long-established rule of laws that the mining laws shall be liberally construed in favor of the mining prospector (See Lindley on Mines, Third Edition, Volume II, page 899, section 381). This rule has not been applied in this *Coleman* case.

3. The administration of the mining laws by the Department of the Interior in recent years, and particularly in the *Coleman* case, is contrary to the laws as "passed and intended" by Congress. Such administration is attempted legislation; therefore, is unconstitutional. This is proven by the various recent decisions, and is clearly admitted in an address by H. R. Hockmuth, then Associate Director of the Bureau of Land Management, in an address delivered July 17, 1964, before the Rocky Mountain Mineral Law Institute. The address appears in Volume 10 of the proceedings of

that organization, beginning at page 467. Following are excerpts from that address:

> "There can be no gainsaying that the Mining Law of 1872 is not administered as it was originally written and intended . . ." (p. 473).
>
> "The result is that what we are administering today is not the mining law, but the rather substantial body of legal and quasi-legal precedents which largely are of our own making . . ." (p. 489).

4. The Department of the Interior misinterpreted section 161 of the mining laws (The Building Stone Act, 30 U.S.C. 161), which was very plain and simple and, therefore, there was no need or legal authority for interpretation. The rule against such interpretation of laws is clearly stated by Mr. Justice Black in a series of lectures on the Constitution delivered by him before the Columbia University School of Law in March, 1968. The lectures have been recently published in a book entitled. "A Constitutional Faith." At page 8 we read:

> "Of course I realize 'that it is a constitution we are expounding.' But this, does not mean that in order to obtain results thought to be desirable at the time, judges may rewrite our basic charter of government under the guise of interpreting it . . ."

Again, on page 20, near the bottom of the page, Mr. Justice Black continues: ". . . The courts are given power to interpret the Constitution and *laws,* which means to explain and expound, not to alter, amend, or remake . . ." (Emphasis added)

5. The 1955 Common Varieties Act was wrongly applied to Mr. Coleman's mining claims because they

were located many years before the 1955 law was passed and, therefore, excluded from that law by its terms.

6. The additional rule for discovery of "marketability at a profit" which this Court states is complementary to the "prudent man" rule, was not published in the Federal Register as required by the Administrative Procedure Act, 5 U.S.C. Section 552. It is, therefore, illegal.

The so-called "marketability at a profit" rule was never published in any of the pamphlets issued by the Department of the Interior for the purpose of informing the public of the General Mining Regulations.

7. The "complementary" rule of "marketability at a profit" is unconstitutional because it is vague and indefinite.

Conclusion.

For the reasons above set forth, it is respectfully submitted that this petition for writ of certiorari be granted and that the case be sent back to the United States Court of Appeals for the Ninth Circuit with a mandate instructing that Court to return the case to the Department of the Interior for further hearing, in accordance with the mining laws and the instructions of this court.

Respectfully submitted,

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APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Alfred Coleman and Edward J. McClennan, *Appellants,* vs. United States of America, *Appellee.* No. 20,227.

ORDER

[December 4, 1968]

Before: CHAMBERS and JERTBERG, Circuit Judges, and THOMPSON, District Judge.

PER CURIAM:

The mandate of the Supreme Court of the United States in this case declares:

"ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the said United States Court of Appeals in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby, remanded to the United States Court of Appeals for the Ninth Circuit for further proceedings in conformity with the opinion of this Court."

The Opinion of that Court referred to in the mandate states: "* * * [W]e hold that the United States is entitled to eject respondents from the land and that respondents' counterclaim for a patent must fail."

The judgment of the District Court from which this appeal was taken orders, adjudges and decrees:

"1. That the plaintiff, United States of America, is declared to be the sole owner of all right, title and

interest in the lands described herein to the exclusion of any right, title or interest in any asserted mining claims or mining locations of the defendants herein.

"2. That the counterclaim of the defendant Alfred Coleman herein be, and hereby is dismissed.

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendants herein, their agents, and others acting in concert with or participating with them, are each and all,

"1. Restrained and enjoined from using, occupying or maintaining any structures, equipment or other personal properties on the land described in the complaint herein and set forth in detail in the answer of defendants.

"2. Restrained and enjoined from entering upon, or being upon said lands for the purpose of using and occupying the same pursuant to any asserted mining claims of said defendants, or of either of them, or for the purpose of operating or using any claimed mining locations thereon, or for the purpose of doing any acts or things thereon related to or claimed to be related to said mining claims or mining locations.

"3. Restrained and enjoined from interfering with, impeding, obstructing, or resisting plaintiff, United States of America, its officers or employees, departments or agencies, in any acts or things done or to be done in the exercise of the United States' complete control and dominion over said lands, upon condition that the defendants have 60 days from final judgment on appeal or otherwise, within which to remove or otherwise dispose of structures or any other property on said lands; and

"4. That each party shall bear its costs of suit herein."

This judgment is in complete conformity with the mandate and opinion of the Supreme Court.

Appellant has moved for a hearing or rehearing, hoping that this Court will find in the mandate of the Supreme Court room for discretion to award a new trial or new hearing either in the administrative procedure in the Department of the Interior or before the District Court to determine issues not explicitly discussed and disposed of by the Supreme Court. We find no such ambiguity or flexibility in the mandate and opinion from the Supreme Court. Accordingly,

IT IS ORDERED that the Judgment entered by the United States District Court, Southern District of California, Central Division (now the Central District of California) on February 25, 1965, is affirmed.

CHAMBERS, Circuit Judge, concurring:

There is a puzzle here: Why did the Supreme Court remand the case to us?

But I have reluctantly concluded it left us no discretion. I have tried and failed to find some way we could salvage some part of our original opinion (see 363 F.2d 190) for which I retain my fondness.

APPENDIX B.

The Common Varieties Act of July 23, 1955.

Title 30 U.S.C. 611: (July 23, 1955, c. 375, sec. 3, 69 Stat. 368, amended Sept. 28, 1962, Pub. L. 87-713, Sec. 1, 76 Stat. 652.)

Sec. 611. COMMON VARIETIES OF SAND, STONE, GRAVEL, PUMICE, PUNICITE, OR CINDERS, AND PETRIFIED WOOD

No deposit of common varieties of sand, stone, gravel, pumice, punicite, or cinders and no deposit of petrified wood shall be deemed a valuable mineral deposit within the meaning of the mining laws of the United States so as to give effective validity *to any mining claim hereafter located under such mining laws: Provided, however,* That nothing herein shall affect the validity of any mining location based upon discovery of some other mineral occurring in or in association with such a deposit. "Common Varieties" as used in sections 601, 603 and 611-615 of this title does not include deposits of such materials which are valuable because the deposit has some property giving it distinct and special value and does not include so-called "block pumice" which occurs in nature in pieces having one dimension of two inches or more. "Petrified wood" as used in sections 601, 603, and 611-615 of this title means agatized, opalized, petrified, or silicified wood, or any material formed by the placement of wood by silica or other matter. (Emphasis added.)

The following sections of the Act also limit the law to "mining claim hereafter located": Sec. 612(a)(b)(c).

Section 615 contains provisions protecting the rights of claimants of mining claims located prior to the passage of the Common Varieties Act on July 23, 1955.